IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL NO. 209 OF 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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SAVITABEN RAVISHANKER, WD/O. NATHALAL RAVAL & ORS. - Appellant(s)
Versus
SITABEN WD/O. JOSHI DAYASHANKER MAHIDHAR - Respondent(s)

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Appearance :
SHRI SAURABH PATEL with SHRI R.C. JANI for Appellant(s) : 1 - 4.
SHRI S.P. MAJMUDAR for Respondent(s).

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 24/01/2007

ORAL JUDGMENT

1. The appeal has been admitted for hearing the parties on the following substantial questions of law:

> *"1) Whether the Lower Appellate Court has committed an error of law in holding that the finding of the Trial Court about*

exclusive ownership of the plaintiff regarding the suit wall was conclusive as no appeal or Cross-Objections were filed by the defendants? (Order 41, Rule 33 of the C.P.C.)

2) *Whether the registered mortgage deed Exh.44, dated 1-6-1935 executed by Ravishanker Ranchhodbhai and others in favour of Babalbhai Pitambardas, and registered sale deed in respect of the same property executed by Ravishanker Ranchhoddas and others on 3-8-1944, containing a recital about the eastern wall of the defendants being a joint wall, were not relevant evidence, regarding the character of the suit wall and whether they were liable to be discarded as independent pieces of evidence and whether the ratio laid down in the Division Bench judgement in Vaidy Trambaklal Parshotam V/s. Madhavji Premji in 14 G.L.R. 194 was not applicable to the present case?*

3) *Whether the Lower Appellate Court has committed an error of law in not taking into account the observations made by the Trial Court to the effect that the plaintiff's wall is not in a decayed condition and considering the recital occurring in Exhs.44 & 45, the wrong done to the plaintiff's right is not a wilful evasion inasmuch as the defendants might be under the impression that the wall in question is a joint wall, and also that on consideration of the total length of the*

plaintiff's wall and portion of encroachment and projection in the plaintiff's wall, this is not a just and apt case where the relief of mandatory injunction should be granted?"

2. The short facts necessary for disposal of the present appeal are that the respondent-plaintiff filed a suit submitting, *inter alia*, that the present appellants owned House No.1013 on the western side adjacent to the house of the respondent. The plaintiff's house is marked as House No.1015. The house of the defendants is on the western side from the house of the plaintiff and the back-side wall on the western side of the plaintiff's house belonged exclusively to the plaintiff. It is submitted that the defendants had no right whatsoever on the western wall of the plaintiff, but, taking undue advantage of the situation, they had made certain encroachment in the wall by fixing ceiling in the western wall and thereby caused damage to the plaintiff's wall. The plaintiff, therefore, prayed for mandatory injunction and other reliefs.

2.1 The defendants appeared before the Court and submitted that the wall jointly belonged to the parties and the defendants had right to put ceiling on the said wall situated between the two houses.

2.2 The learned trial Court, after recording the evidence and hearing the parties, held that the wall on the western side of the plaintiff's house (hereinafter referred to as “back-wall” for the sake of brevity) was not jointly owned by the parties, but, did belong exclusively to the plaintiff. It, accordingly, directed removal of the part of the ceiling which was raised on the south-northern side of the house and also directed payment of a sum of Rs.200/- as damages to the plaintiff.

2.3 The plaintiff, being aggrieved by the said judgement and decree, took up the matter in appeal. The learned Appellate Court directed removal of the part of the ceiling which was inserted in the back-wall of the plaintiff.

2.4 Being aggrieved by the said judgement and decree, the defendants are before this Court.

3. So far as the first question is concerned, to my mind, it would not arise in the matter because the learned Appellate Court did not commit any error of law in holding that the back-wall exclusively belonged to the plaintiff. In fact, the learned trial Court recorded the findings in favour of the plaintiff and the present

appellants-defendants, who were the respondents before the learned first Appellate Court, did not challenge the said findings.

4. So far as the documents, Mortgage Deed - Exh.44 dated 1st June, 1935 executed by Ravishanker Ranchhodji and others and Sale Deed in respect of the same property executed by Ravishanker and Ranchhoddas and others are concerned, the same would not lead to any presumption in favour of the defendants because an *ipse dixit* by a party would not adversely affect the rights of the third party. I, accordingly, answer Question No.2 in favour of the respondent-plaintiff.

5. So far as the third question is concerned, I am unable to concede to the submissions made by the defendants-appellants because present is not a case of damaging the wall to a great extent, but, the question in the present case is that whether the act of the defendants tantamounts to breach of the plaintiff's right and invasion of his property by making encroachment upon the wall. The Courts, after referring to the documents of the parties, have come to the finding of fact that the back-wall situated at the back of the plaintiff's house exclusively belongs to the plaintiff. If such finding cannot be challenged in this Second Appeal, then, the

plaintiff certainly would be entitled to a decree in his favour for removal of the portion of the ceiling which has been inserted by the appellants in the back-wall of the house of the plaintiff. Question No.3 is, therefore, answered in favour of the plaintiff.

6. At this stage, the learned Counsel for the appellants submits that if some time is given to the defendants to remove the insertion from the back side wall of the plaintiff's house, then, they would be able to save their house and the terrace.

7. Taking into consideration the totality of the circumstances, I am of the opinion that the appeal deserves to and is, accordingly, dismissed, but, however, it is made clear that the effect of this judgement shall remain in abeyance for a period of three months, enabling the defendants to make appropriate construction in their own premises to save the ceiling. This order of stay/concession shall lose its efficacy on 1st May, 2007. The interim order granted earlier is vacated, but, however with the liberty aforesaid. No costs.

Let a decree be framed accordingly.

[R.S.Garg, J.]

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